DELEGATE MOSER: There was a memorandum prepared by Delegate Bothe, Macdonald and myself that was distributed to you last Friday, I think, and it gives the historical background of the juries as judges of the law provision which is in our present Constitution and which section 10 would continue. It sets forth the reasons why we suggest this is an anachronistic arrangement and should not be continued in the new constitution.

I am hopeful that by providing the setting the memorandum may serve to avoid spending unnecessary time debating and explaining this provision which it does.

I also refer to a memorandum which Delegate Churchill Murray distributed and in which are set forth his views for the opposing position.

By deleting section 10, "Criminal Jury, Judge of Law and Fact," this Convention will permit the same type of procedure to apply in civil cases as apply in criminal cases with respect to instructions of judges and agreements of counsel. This difference in porcedure which exists by reason of section 10 has been a source of confusion to jurors for years. We submit that the time has now come to remove this confusion and to bring Maryland into line with virtually all the other fifty states and the federal courts. As we point out in the memorandum in paragraph 1, every eminent authority that has reviewed this provision has recommended its deletion. It has been called—I keep having something placed in front of me here.

DELEGATE JAMES (presiding): This must be a diversionary tactic.

DELEGATE MOSER: Since all of you have copies, I will not read it. Delegate Rybczynski may want to.

(Laughter.)

DELEGATE MOSER: In any case, it has been called, as I mentioned before, anachronistic in one Court of Appeals case, an anomalous situation which should not be permitted to remain as a blight upon the administration of justice in the State of Maryland, archaic, outmoded, and atrocious, and a thorn in the flesh of Maryland's body of criminal law by authorities such as Chief Judge Prescott of the Court of Appeals, Judge Henderson, Chief Judge Dennis of the supreme bench of Baltimore City.

As Delegate Hargrove told you yesterday, I think a commission on which he served and which is headed by former Chief Judge Frederick Brune recently is recommending the abolishment of this provision. Judge Sobeloff, as I point out on page 1 of the memorandum, writing for the Fourth Circuit Court of Appeals, notes that we are meeting in convention and that we will consider it and by implication suggests that this be removed.

The major reasons for removing it are set forth and there are five in number. In the first place, the 1851 Convention, when it was first adopted, adopted it under a misconception of what the common law of England was. They adopted it because there was a multitude of different procedures with respect to rulings on questions of law among the various courts of Maryland and they thought that they were providing the type of consistency which England sought to provide. I will not go into technicalities, but there was an act known as Fox's libel law which changed the law in England in criminal libel cases and they thought this was enunciative of the law of England. But in any case, whatever the reasons, they no longer exist.

The second reason for abandoning this provision is that some fifty years ago there were ten other jurisdictions at least that had it. All of them have abandoned it one way or the other except for Indiana, and Indiana, as is pointed out I think in the Committee Report, has rendered it virtually useless because the judge is not required to charge the criminal jury that they can disregard the instructions. This is a requirement under Maryland law.

The main present effect, and this the bad reason, is that it tends to confuse criminal juries and subverts justice. What happens is that prosecutors and defense counsel get up and argue different propositions of law to the jury and each of these may differ from the judge's instructions.

I have done this myself as a prosecutor and at least on one occasion when it was done I think that an injustice occurred, that is to say that someone was convicted of an offense for which he probably should not have been convicted and the reason for it was that I was permitted, in fact expected, to argue the law to the jury.

It puts a undue emphasis on clever advocacy and persuasiveness and I suggest that there is sufficient realm in arguing facts to a jury for this without confusing juries by arguing law as well.

In fact, the jury is handcuffed. They cannot take the lawbook that the prosecutor and defense counsel use in the jury room